Supreme Court, U.S.
FILED
MAY 15 2001
OFFICE OF THE CLERK

(4)

No. 00-1379

IN THE

# Supreme Court of the United States

NGC SETTLEMENT TRUST and THE ASBESTOS CLAIMS MANAGEMENT CORPORATION,

*Petitioners,*

*v.*

NATIONAL GYPSUM COMPANY,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## RESPONDENT'S OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

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16 pp

This is the third time that the Legal Representative for Unknown Asbestos Disease Claims (the "Legal Representative") and the Center for Claims Resolution (the "CCR") have sought to file *amicus curiae* briefs in support of the Petitioners in this appeal. The lower courts both denied identical *amicus* motions from these same parties[1] and this Court should deny their motion as well — particularly given the current procedural context of this case. Indeed, Supreme Court Rule 37.2(b) specifically provides that an opposed motion for leave to file an *amicus curiae* brief before the Court has considered whether to grant certiorari "is not favored." This provision is particularly apt here, where, as described below, the putative *amici* add nothing to the Petition.

## 1. As the Interests of the Proposed *Amici Curiae* are Purely Partisan, their Motion should be Denied, as it was in the Lower Courts.

The district court and the Fifth Circuit denied identical motions below on the grounds that proposed *amici curiae* were "clearly aligned" with petitioners and "purely partisan." App. A & B, attached hereto. Indeed, all three are directly and economically linked to the Petitioners. The CCR is a joint defense facility that, until June 2000, included Petitioners ACMC and the Trust among its paying members.[2] The Trust

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1. The Legal Representative and CCR have added the Bodily Injury Trust Advisory Committee (the "BI TAC") to their proposed *amici* team, but their arguments and attempts to raise matters outside of the record are the same. The orders of the district court and the Fifth Circuit denying their prior motions are set forth in full in the Appendix to this Opposition.

2. Capitalized terms not defined herein have the meaning assigned to those terms in Respondent's Brief in Opposition.

compensates the Legal Representative for acting as Legal Representative and pays the Legal Representative's lawyers and other professionals. Resp. App. 313a.[3] The Trust likewise pays fees to the BI TAC members for serving on the BI TAC and reimburses their expenses. Trust Agreement Section 6.07.

Since the start of this litigation, the Petitioners, the Legal Representative, and the BI TAC have collaborated in an attempt to have the asbestos liabilities of Old-NGC imposed on New-NGC. In the summer of 1997, before this litigation began, these parties exchanged drafts of motions and other court papers and then filed a series of pleadings attempting to have New-NGC held liable for the torts of ACMC. They coordinated their litigation strategies against New-NGC in the bankruptcy court. For example, when New-NGC sought the production of correspondence between the Legal Representative, the BI TAC and the Trust regarding this very litigation, they refused to produce such correspondence, claiming that they shared "common interests" with one another relating to New-NGC's liability for asbestos claims against Old-NGC and that such materials thus fell within the "joint defense privilege."

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3. The proposed *amici curiae* state that "no person other than *amici curiae* made any monetary contribution to the preparation or submission of their motion or brief." Motion n.1. Given the obligation of the Trust to pay the fees and expenses of the Legal Representative and the BI TAC, this representation may be correct only because reimbursement has not yet been made. The Trust has paid all of the attorneys' fees and expenses of the Legal Representative in connection with the litigation against New-NGC to date, including the fees and expenses incurred in the Legal Representative's motions for leave to file *amicus curiae* briefs in this appeal in the lower courts.

There is no doubt therefore that the interests of these parties are entirely partisan. They should not be permitted to participate in this appeal, particularly under the guise that they are "friends of the court."

## 2. The Proposed *Amici Curiae* Brief Raises No Issue that Warrants this Court's Attention.

We will comment briefly on the issues raised in the brief. The putative *amici* make two points. First, they start with the claim that New-NGC acknowledged its supposed liability for Unknown Claims at confirmation, because certain members of the BT Committee were concerned about the risk of that liability. In making that claim, they rely in the main on documents outside the record. Again, they tried to do this below, and the Trust even moved to supplement the record, but the lower courts rejected these efforts. No appeal was taken from the denial. More fundamentally, whether this supposed acknowledgment of liability indeed did occur (and the consequences of that) is purely a matter of sorting through the relevant documents and orders and is hardly an issue that merits this Court's attention. The Fifth Circuit was faced with precisely these claims below by the Trust and found those claims "insufficient to overcome the plain language of the Plan documents." Pet. App. 35a.

Second, *amici* argue that the Fifth Circuit failed to accord due deference to the bankruptcy court's interpretation of the Plan Documents. This argument has no relevance to the Petitioners' issues. Moreover, it does not on its own meet the standards for granting a petition set forth in Supreme Court Rule 10. The Fifth Circuit ruled that it should not defer to the bankruptcy court's conclusion that the Plan Documents "implicitly imposed" liability on New-NGC where such interpretation contradicted the unambiguous text of the Plan

Documents. Pet. App. 27a-28a. That ruling is not novel or controversial, nor does it present a conflict with the ruling of any other court. Instead, it is consistent with longstanding rules of construction that courts should give effect to the plain meanings of bankruptcy plans and orders and that a court, even one that confirmed the plan in question, cannot later change its terms under the guise of interpretation.

## CONCLUSION

The motion for leave to file brief *amici curiae* in support of the Petition should be denied.

Respectfully submitted,

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# APPENDIX

**APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED DECEMBER 20, 1999**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 99-10758

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In The Matter Of:

NATIONAL GYPSUM COMPANY;
AANCOR HOLDINGS INC

Debtors

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THE NEW NATIONAL GYPSUM COMPANY

Appellant

v.

THE NATIONAL GYPSUM COMPANY
SETTLEMENT TRUST

Appellee

---

Case No. 99-10760

In The Matter Of:

NATIONAL GYPSUM COMPANY

Debtor

---

NATIONAL GYPSUM COMPANY

Appellant

v.

NGC SETTLEMENT TRUST; THE ASBESTOS
CLAIMS MANAGEMENT CORPORATION

Appellees

*Appendix A*

Appeals from the United States District Court for the Northern District of Texas, Dallas

ORDER:

IT IS ORDERED that the motion of Daniel Phillips to file amicus brief is DENIED

IT IS FURTHER ORDERED that the motion of Daniel Phillips to participate in oral argument is DENIED

IT IS FURTHER ORDERED that the motion of Center for Claims Resolution to file amicus brief is DENIED

IT IS FURTHER ORDERED that the motion to allow National Gypsum Company a reasonable period of time to file their reply brief, if the court permits either Daniel Phillips or Center for Claims Resolution to file an amicus curiae brief is DISMISSED AS MOOT.

/s/ Harold R. DeMoss
HAROLD R. DeMOSS
UNITED STATES CIRCUIT JUDGE

**APPENDIX B — ORDER OF THE UNITED DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION JULY 13, 1998**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION
NO. 3:98-CV-1032-P

IN RE:

NATIONAL GYPSUM COMPANY
AANCOR HOLDINGS, INC.

Debtors.

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NATIONAL GYPSUM COMPANY,

APPELLANT,

v.

NGC SETTLEMENT TRUST and THE ASBESTOS CLAIMS MANAGEMENT, CORPORATION,

APPELLEES.

**ORDER**

Now before the Court are the following:

1. Conditional Motion of the Center for Claims Resolutions ("CCR") for leave to file *Amicus Curiae* Brief, filed June 9, 1998;

*Appendix B*

2. Appellant's Emergency Motion to Strike Brief of CCR and Opposition to Conditional Motion for Leave to file *Amicus Curiae* Brief and Supporting Brief, filed June 15, 1998;

3. Motion and Brief of Daniel M. Phillips, Court-Appointed Legal Representative for Unknown Asbestos Disease Claimants, for Leave to File *Amicus Curiae* Brief, filed June 15, 1998;

4. Appellees' Motion to Supplement the Record, filed June 15, 1998;

5. Appellant's Opposition to Motion of the Legal Representative for Leave to File *Amicus Curiae* Brief and Emergency Motion to Strike Brief, filed June 17, 1998;

6. Appellant's (A) Objection to Appellees' Motion to Supplement Record, (B) Motion to Strike References to Proposed Supplemental Record in Appellees' Brief and (C) Supporting Brief, filed June 18, 1998;

7. Legal Representative's Reply in Support of His Motion for Leave to File *Amicus* Brief, filed June 22, 1998;

8. Appellees' Reply Brief in Further Support of Motion to Supplement the Record, filed June 22, 1998; and

9. CCR's Opposition to Appellant's Motion to Strike its Brief and Its Reply in Support of Its Conditional Motion for Leave to File *Amicus Curiae* Brief, filed June 23, 1998.

*Appendix B*

**A. Motion to Supplement the Record**

In their motion, Appellees move to supplement the record in this appeal. Specifically, Appellees seek to include in the record five pleadings and briefs filed in either the main bankruptcy case below or in a previous appeal from the bankruptcy case. (Appellees' Motion to Supplement the Record, at 2).[1] Appellant objects to Appellees' motion to supplement the record, and moves to strike references to the proposed supplement in Appellees' brief. In their motion, Appellees maintain that the five documents are relevant to issues raised in Appellant's brief in the captioned appeal to this Court. In seeking to strike these items, Appellant asserts that none of the proposed supplemental documents were part of the trial record before the Bankruptcy Court. Further, Appellant argues that the Bankruptcy Court sustained an objection preventing Appellee from introducing one of the documents into evidence at trial. (NNG's Objection to Appellees' Motion to Supplement the Record, at 2).

An item that was not considered by the trial court in reaching its decision should be stricken from the record on appeal. *Metro North State Bank v. Barrick Group, Inc.*, 100 B.R. 152, 154 (Bankr. D. Conn. 1989); *Daly-Murphy v. Winston*, 820 F.2d 1470, 1473 (9th Cir. 1987). Despite the alleged relevance of the documents, there is no indication that the Bankruptcy Court considered or even reviewed the proposed documents when reaching its judgment in the underlying adversary proceeding. An appellate court is to

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1. A description of the five documents appears at page 2 of Appellees' Motion to Supplement the Record.

review what happened in the court below; an appeal does not present a party with "a license to build a new record." *Anthony v. United States*, 667 F.2d 870, 875 (10th Cir. 1981). Absent any indication that the Bankruptcy Court considered any of the proposed documents in arriving at its ruling, the Court declines to allow the proposed documents to become part of the record of this appeal. Consequently, Appellees' Motion to Supplement the Record is, hereby, DENIED. Accordingly, all references to the proposed supplement in Appellees' brief shall be stricken.

**B. CCR's Standing**

In its motion, the CCR asserts that they believe they are a proper party to this appeal, and, therefore, they seek to file a brief in support of the Bankruptcy Court's judgment. (Conditional Motion of CCR for Leave to File *Amicus Curiae* Brief, at 1). If the Court determines that CCR is not a proper party to this appeal, then CCR seeks leave to file their brief as an *amicus curiae*. *Id.* For the foregoing reasons, however, the Court concludes that CCR is not a proper party to this appeal, and denies CCR leave to file its brief as an *amicus curiae*.

It is undisputed that CCR was neither a party to the underlying adversary proceeding, nor sought leave to intervene in that action.[2] Despite their failure to intervene in the adversary proceeding, the CCR asserts that it is a proper party and has standing to appeal the Bankruptcy Court's judgment. (Conditional Motion of CCR for Leave to File

2. In addition, the CCR offers no explanation for their failure to seek to intervene in the underlying adversary proceeding.

*Amicus Curiae* Brief, at 1). To possess standing to appeal a bankruptcy court's order, a litigant who was not a party to the adversary proceeding must qualify as a "person aggrieved" by that order. *Bayoud v. Medical Center Hospital of Garland*, 188 B.R. 925, 931 (N.D. Tex. 1995) (citations omitted). In general, only persons "directly and adversely affected pecuniarily by an order of the bankruptcy court have been held to have standing to appeal that order." *In re Andreuccetti*, 975 F.2d 413, 416 (7th Cir. 1992) (*quoting In re Fondiller*, 707 F. 2d 441, 442 (9th Cir. 1983). In their motion, the CCR asserts that it satisfies the "person aggrieved" requirement, and therefore has standing, "because a reversal of the Bankruptcy Court's judgment would have an adverse pecuniary impact on the CCR's members." (Conditional Motion of CCR for Leave to File *Amicus Curiae* Brief, at 1). The Court does not agree.

The CCR does not satisfy the "person aggrieved" standard with respect to this appeal, because it has not shown that it was directly and adversely affected pecuniarily by the Bankruptcy Court's Order. Specifically, the CCR does not seek to appeal an *adverse* ruling from the Bankruptcy Court. Rather, the CCR wishes to file a brief, and participate as a party in this appeal, in order to *support* the Bankruptcy Court's judgment. While the CCR acknowledges that it was not adversely affected by the Bankruptcy Court's judgment, it argues that "[p]arity of reasoning should accord the same party status to a person with pecuniary interests at stake who seeks to participate in the appeal to uphold rather than challenge a judgment." (Brief of CCR, at 5). Despite this belief, the CCR fails to cite any case law or other authority to support this proposition. Moreover, the Court recognizes

and agrees with the established policy of limited appellate jurisdiction in the bankruptcy context. *See Holmes v. Silver Wings Aviation, Inc.*, 881 F.2d 939, 940 (10th Cir. 1989) (explaining that decisions adopting the "person aggrieved" standard " 'reflect the understandable concern that if appellate jurisdiction is not limited, bankruptcy litigation will become mired in endless appeals brought by a myriad of parties who are indirectly affected by every bankruptcy court order' ") (quoting *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 642 (2d Cir. 1988)). Given that the Bankruptcy Court's judgment does not directly and adversely affect pecuniarily the CCR, the Court concludes that the CCR has not satisfied its burden of showing that it has standing under the "aggrieved person" standard. Accordingly, the Court finds that the CCR is not a proper party to this appeal.

**C. Motions for Leave to File *Amicus* Briefs**

Both Daniel M. Phillips ("Phillips"), the legal representative appointed to represent unknown disease claimants, and the CCR seek to file briefs as *amicus curiae.* Whether to accept, *vel non*, an *amicus* brief is solely within the discretion of the court. *Linker v. Custom-Built Machinery Inc.*, 594 F. Supp. 895, 897 (E.D. Penn. 1984) (citing *Alexander v. Hall*, 64 F.R.D. 152, 155 (D.S.C. 1974)). Upon a cursory examination of the submissions, it is obvious that both Phillips' and the CCR's interests are clearly aligned with that of Appellees' with respect to the main issue on this appeal. Consequently, neither Phillips nor the CCR can be considered a disinterested "friend of the court". *See Leigh v. Engle*, 535 F. Supp. 418, 420 (N.D. Ill. 1982).

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While a party need not be "totally disinterested" to be an *amicus curiae*, leave to file should be denied if the *amicus* brief comes from a person with a partisan, rather than impartial view. *See Id.* As this Court has previously noted, "[t]he amicus curiae tradition does not sanction allowance of additional oral and written argument that is purely partisan." *Browning v. Prostok*, Civ. Action No. 3:96-CV-1206-P (N.D. Tex. Aug. 19, 1998 (Solis, J.) (attached as Ex. A to Appellant's Emergency Motion to Strike Brief of Center for Claims Resolution and Opposition to Conditional Motion for Leave to File *Amicus Curiae* Brief and Supporting Brief).

Accordingly, for the reasons stated, the Court finds that Phillips' and the CCR's motions for leave to file *amicus curiae* briefs should be and are, hereby, DENIED.

*Appendix B*

## CONCLUSION

Having carefully considered the parties' arguments and the pertinent authorities, the Court concludes that:

1. Appellees' Motion to Supplement the Record should be DENIED;

2. The CCR's is not a proper party to this action, its Conditional Motion for Leave to File *Amicus Curiae* Brief should be DENIED.

3. Phillips motion for leave to file *amicus curiae* brief should be DENIED.

**So Ordered.**

This *13th* day of July, 1998.

/s/ Jorge A. Solis
JORGE A. SOLIS
United States District Judge